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IN THE MATTER OF THE ONTARIO HUMAN RIGHTS  
CODE, R.S.O. 1970, C. 318, AS AMENDED

- and -

IN THE MATTER OF A COMPLAINT LAID BY JAY C. COSGROVE  
AGAINST THE CORPORATION OF THE CITY OF NORTH BAY

BOARD OF INQUIRY

R. S. MACKAY, Q.C.

APPEARANCES

John A. O'Neill - Counsel and City Solicitor for the  
City of North Bay

Julian Polika - Counsel for the Ontario Human Rights  
Commission

Peter Pickerack - Counsel for Jay C. Cosgrove

HEARING

February 19, 1976, Empire Hotel, North Bay, Ontario.



## GENERAL BACKGROUND

The complainant, Mr. J. C. Cosgrove, was born on July 5, 1915. Accordingly he was sixty years of age on July 31, 1975, when he was required to retire by the Corporation of the City of North Bay from his position as Chief of the Fire Prevention Bureau of the North Bay Fire Department. This enforced retirement was pursuant to a by-law of the Corporation making retirement mandatory at age sixty for all members of the Fire Department. The by-law in question (No. 2085) was enacted in 1963 and reduced the mandatory retirement age from 65 to 60. It was enacted in order to reflect a term to that effect contained in a collective agreement previously concluded between the Corporation and Local 284 of the International Association of Fire Fighters, representing from time to time all employees of the North Bay Fire Department as their exclusive bargaining agent. The same by-law directed notification of the change of age to the Ontario Municipal Employees Retirement Board with respect to the pension scheme administered by the Board.

To the foregoing mandatory retirement provision certain specific exemptions were created in 1966 by by-law (No. 2100) which was restricted to six designated individuals who were permitted to continue employment as fireman until age 65. This was done because, in their particular cases, their normal age 60 pension entitlements were deemed to be inadequate and accordingly they were given the opportunity to improve their benefits by working and making further pension contributions until age 65. No additional exemptions have been made since 1966 and Council made it clear at that time that these would be the only exceptions. The last of the individuals then exempted has now retired. (The 1975 collective agreement evidences the consent of Local 284 to such an exception).



MR. COSGROVE'S BACKGROUND

Mr. Cosgrove joined the North Bay Fire Department on January 20, 1944. In July 1959, or thereabouts, he was appointed Fire Chief for Widdifield Township, immediately adjacent to the City of North Bay, where he served in that capacity until December 31, 1967. On January 1, 1968, Widdifield Township was formally amalgamated with North Bay and the Township Fire Department was absorbed into the North Bay Department. In the resulting re-organization Mr. Cosgrove became Chief Fire Prevention Officer for North Bay and remained in that position from January 1968 until his services were terminated as aforesaid on July 31, 1975.

While employed by Widdifield Township Mr. Cosgrove participated in a private pension scheme, as opposed to the OMERS plan applying to North Bay firefighters, which private plan provided for a normal retirement age of 65 years. After amalgamation, to conform to the age 60 rule already prevailing in the original North Bay Department, Mr. Cosgrove's private plan (which he elected to retain rather than participate in OMERS) was amended by by-law of the Corporation (No. 71-74) to provide for a mandatory retirement age of 60. Mr. Robert Young, Personnel Officer for the City of North Bay testified that because of an oversight this change was not in fact effected until July, 1974, the oversight occurring because no one came up for retirement in the interval.

In his testimony, Mr. Cosgrove stated that he was given to understand that as a result of amalgamation, and particularly with reference to benefits, former Widdifield firemen would not suffer in consequence of their absorption into the new North Bay fire department. Mr. Young, the Personnel



Officer, testified that he was not aware of the source of such an undertaking but noted that Mr. Cosgrove had applied in 1971, 1972 and in 1974 for a back dating of his seniority from January 1, 1968 to his original employment date of July 20, 1944 with the "old" North Bay Fire Department and that such request had been granted by City Council in 1974. According to Mr. Young this made Mr. Cosgrove eligible for supplementary pension benefits from the City under the Municipal Act, which without such back dated seniority he would not have been entitled to and which, together with his private plan pension benefits, actually made him eligible to receive entitlements superior to what would be available to firemen under OMERS for the same period. These negotiations indicated to Mr. Young that Mr. Cosgrove was preparing for his retirement at the time and, indeed, the latter admitted in testimony that the main reason for his back dating applications was that it would help his pension when he had to retire at age 60 as, at the time, he felt he was obliged to.

However, early in 1975, as a result of a conversation with a friend who was a member of the Sudbury Fire Department, Mr. Cosgrove began to feel that he was not obliged to retire on the following July 31 but rather that he could continue in service past that date, either by way of exemption from by-law 2085 (as had been done in 1966 pursuant to by-law 2100) or as a matter of right protected by the Ontario Human Rights Code. Accordingly on February 5, he wrote a letter to the Mayor and Council of North Bay requesting an extension of employment as Chief Fire Prevention Officer. In this letter he reminded Council that exceptions had been made in the past and expressed his opinion that, in any event, the age of 60 mandatory retirement provision deriving from the collective agreement between Local 284 and the Corporation was contrary to the Human Rights Code.



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Mr. Cosgrove's request for an extension was denied by Council on March 26. On April 22 a complaint was filed with Mr. Young by the Ontario Human Rights Commission and brought to the attention of Council and on June 4 Mr. Young was visited by a regional officer of the Commission requesting that Council continue Mr. Cosgrove's employment beyond July 31 until such time as the complaint was resolved. This request on behalf of the Human Rights Commission was denied by resolution of Council on June 30 and communicated by Mr. Young to Mr. J. P. Fortier, Human Rights Officer, Sudbury, by letter dated July 9. This letter quoted Council's resolution as follows:

"that the Ministry of Labour, Ontario Human Rights Branch be advised that the request of J. C. Cosgrove to extend his service to age 65 be refused".

The letter added that the intent of the resolution was to deny the request that Mr. Cosgrove be employed beyond July 31, 1975.

In his turn, Mr. Fortier wrote on July 25 further requesting that Mr. Cosgrove's employment be allowed to continue until the matter was resolved which request Council rejected by resolution dated August 11 advising the Commission:

"that as J. C. Cosgrove has retired as of July 31, 1975 and Council intends to appoint a person to the position of Chief of Fire Prevention the request of the Ministry of Labour contained in its letter dated July 25, be refused".

(In fact a new Fire Prevention Officer was appointed soon thereafter from within the ranks and the vacancy below thus created was likewise filled from below and so on down through the ranks until, at the last, a probationary fire fighter was hired to fill the final position).



Finally, on August 25, Mr. Fortier filed a complaint signed by Mr. Cosgrove, redrafting the original complaint of April 22, wherein Mr. Cosgrove recited the mandatory age 60 retirement policy of the Corporation, the latter's denial of his request for an extension to age 65, and his consequent compulsory retirement on July 31, 1975 by the Corporation. The complaint concluded with the following allegation:

"I allege that I was refused continued employment with the Corporation of the City of North Bay and discriminated against with respect to a term of condition of my employment by the Corporation ..., contrary to s. 4 (1)(b) and (g) of the Ontario Human Rights Code, R.S.O. 1970, c. 318, as subsequently amended".

It is the above allegation that is the subject matter of this Board of Inquiry. Section 4 (1)(b), (g) of the Code, as it relates to the complaint in question may shortly be stated in the following words of the legislation:

"No person shall refuse to continue to employ any person or discriminate against any employee with regard to any term or condition of employment because of age".

Some further facts may be usefully noted to complete the narrative. At the time of his compulsory retirement on July 31, 1975 Mr. Cosgrove was earning between \$17,000 and \$18,000 a year. In October of that year he obtained a position with Ontario Chemical Company as a Northern Ontario sales representative specializing in a variety of chemical products for industrial and institutional consumers. His present remuneration, including salary, commission and bonus is between \$13,000 and \$14,000 a year but without pension benefits. In response to a question from his counsel, Mr. P. Picherack, Mr. Cosgrove testified that he took the job with Ontario Chemical because he deliberately had refrained from claiming any pension monies from the Corporation,



lest that commit him to an acceptance of his retirement, and he otherwise would have no income coming in.

Finally, at the time of his forced requirement, Mr. Cosgrove enjoyed good general health, in fact he had not missed a single day's work over the past five years and there had been no complaints concerning his work nor any evidence that he was by reason of age physically or mentally unable to satisfactorily perform his functions as Chief Fire Prevention Officer. Indeed, in Mr. Cosgrove's opinion, his present job with Ontario Chemical is more arduous than his former employment with the fire department because of the large territory he is obliged to cover and the great many miles that he must drive.

#### FUNCTIONS OF A FIRE PREVENTION OFFICER

Mr. Cosgrove's role as a Fire Prevention Officer, and as Chief of that division of the Fire Department, did not normally entail that he actually be physically engaged in extinguishing a fire. On the contrary such would rarely happen and only in extreme circumstances or emergencies. Mr. Cosgrove could not recall any occasion when he had been called upon to so act. His primary function was to enter buildings or premises as soon as practicable after a fire had been extinguished and investigate the source and origins of the fire and the loss involved. This however, as he admitted, could be dangerous because of the unsafe condition of gutted buildings and the hazards of walls, roofs and stairs, etc., collapsing. In addition, Mr. Cosgrove's duties included safety inspections of public buildings, such as schools, and considerable paper work in the form of reports to the Fire Marshall's office and for the



Department's own files. In terms of chain of command the Chief Fire Prevention Officer ranks fourth in the Departmental hierarchy, behind the Fire Chief, Deputy Chief and the Chief Training Officer. In their absence he assumes charge of the Department. Finally, in accordance with a Department policy statement issued by the Fire Chief in 1972, the Chief Fire Prevention Officer "shall attend all major fires and may be assigned other duties than [his] own to assist the Chief and Deputy Chief".

#### LEGAL ISSUE

The legal issue involved is simple. Obviously Mr. Cosgrove was refused continuing employment by the Corporation because of his age which, prima facie at least, constitutes a contravention of sec. 4 (1)(b) of the Ontario Human Rights Code, coupled with sec. 19 (a) thereof which defines "age" as meaning any age of forty years or more and less than sixty-five years. However, sec. 4 (1)(b) does not apply, and no contravention occurs where, as provided by sec. 4 (6) of the Code, "age is a bona fide occupational qualification and requirement for the position or employment". In short if by-law 2085, and the collective agreement which it reflects and enforces, honestly prescribe a legitimate age qualification for the special occupation of firefighting then, in my opinion, there is no basis of complaint. If such is not the case then, in my opinion, there has been a contravention of the Code in the circumstances of Mr. Cosgrove's forced retirement prior to age 65, considering that he was in good health, in no way disabled, and willing and anxious to continue in service.





EVIDENCE AND ARGUMENT

On the essential issue whether age 60, and no older, is a bona fide occupational requirement for the employment of firemen the great bulk of the relevant testimony emerged from the examination of four witnesses by Mr. J. O'Neill, counsel for the defendant Corporation, and their cross-examination by Mr. J. Polika, counsel for the Human Rights Commission. These witnesses were Walter Shanahan, a full-time firefighter for 23 years and Executive Vice-President of the Ontario Professional Fire Fighters Association, of which Local 284 is a part; Alan Wharram, Fire Chief for the City of North Bay; Fire Chief Barr of Sudbury and Lyle Keck, Chief Fire Prevention Officer for the City of Sudbury.

Without exception these gentlemen agreed that the job of a Fire Prevention Officer is a hazardous one, imposing considerable physical and mental stress, albeit perhaps not as much as fire fighting itself. Further they testified that although there was no concrete or explicit medical findings available as proof it was their collective opinion based on years of experience and observation that firemen deteriorate or slow down in performance, and are less capable of coping with the exigencies and urgencies of their employment as they approach or pass the age of sixty. They conceded that the foregoing observation is a general rule and that particular individuals might well be able to perform their duties past the age of sixty just as there would be instances of even younger men being unable to do so. All in all, however, they felt that age 60 was an appropriate "rounding-off" figure to define the safe limits of employment in the interests of the individual himself and of his fellow workers



who rely upon him to measure up and pull his weight.

To the counter argument that the Fire Chief of North Bay, because he is excluded from the bargaining unit, is permitted to continue until age 65, Mr. Shanahan felt that this was wrong and Mr. Wharram, the incumbent, deposed that in any case and whatever the state of his pension it was his firm intention to voluntarily retire at the age of 60 because of the stresses and problems that are inherent in the job today. Mr. Barr, the Sudbury Fire Chief, indicated for the same reasons that likewise it was his intention to seek retirement at age 60. The foregoing testimony was in response to Mr. Polika's observation that in the North Bay chain of command structure, previously noted, Mr. Cosgrove might be called upon to assume the responsibilities of Fire Chief and that it was therefore inconsistent and unsound that the former was required to retire at 60 whereas the latter could continue until 65.

With respect to the work of Chief Fire Prevention Officers in particular Mr. Keck, the incumbent in the Sudbury Department, gave examples of the onerous physical and nerve wracking duties such officers are called upon to perform from time to time and agreed that 60 is a good retirement age for firemen and one for which he has fought since 1949. In this respect, Mr. Shanahan noted that 60 out of a total of 73 locals within the jurisdiction of the Ontario Professional Fire Fighters Association have adopted a mandatory retirement age of 60 and although he conceded that this reduction was largely a result of collective bargaining with municipalities, and that pension entitlements and implications were important in such negotiations, nevertheless he testified in cross-examination that:



"The valid reason in my opinion is this. Professional fire fighters, the guys who do the job in the Province of Ontario, believe that sixty in the main should be the retirement age ... . The reason for the belief is that people usually in the early forties, mid-forties, start to lose a step, their thinking starts to slow down just a little bit".

In similar vein, when Chief Barr was asked whether the collective bargaining pattern in the great majority of locals did not simply represent an understandable desire for early retirement on full pension, without regard to physical ability, he replied in the negative and stated that the sole criteria was that firemen felt that they would start to slow down at age 60.

In his excellent closing argument Mr. Polika stressed that Mr. Cosgrove was involuntarily retired solely on account of age, which I find as a fact and is, indeed, hardly disputable. He stressed that there was no evidence that Mr. Cosgrove was unfit to continue, but rather the evidence was to the contrary, nor indeed was there any medical evidence in support of a compulsory retirement age of 60 as a bona fide occupational qualification and requirement for the position of municipal firefighter in respect of the physical and mental requirements for the position, and this lack of medical evidence was conceded by the witnesses. Mr. Polika submitted that their opinions expressing a contrary view were speculative and based on the widespread myth that advancing age is necessarily linked with failing ability to learn, to adjust and keep up with the pace. Such was certainly not the case with Mr. Cosgrove and, in Mr. Polika's opinion, his forced retirement by the Corporation constituted discrimination against the fit, the able and the willing and a contravention of the Code for reasons of age unsupported by any bona fide occupational considerations on the part of the defendant Corporation.



Finally, by way of close analogy, Mr. Polika cited the example of investigators from the Fire Marshal's office who parallel the functions of Fire Prevention Officers such as Mr. Cosgrove. The former are required to be called in, and work side by side with their municipal counterparts in the case of particularly serious fires, i.e., fires resulting in fatalities or losses over \$100,000 or caused by an explosion. In the case of these provincial civil servants however the retirement age is 65. In other words these latter are entitled to work until age 65 if they wish, or voluntarily retire earlier if they wish. If the collective agreement and the Corporation's by-law in the present case had provided for voluntary retirement at age 60, with perhaps some medical examination or qualification as a condition of employment thereafter, there would be, in Mr. Polika's opinion, no contravention of the Code. But such was not the case here and Mr. Polika submits that the requirement of mandatory retirement at age 60 constitutes an infringement of the Human Rights Code.

I hope that the above summary does justice to Mr. Polika's presentation.

On the other hand Mr. O'Neill's argument, equally ably presented, was that the factor of age is a bona fide occupational qualification for firemen and there was an abundance of testimonial evidence, by people who should know, that age 60 is an appropriate limit to continuing employment as a fireman considering the hazards and stresses of that profession. In short, in Mr. O'Neill's submission, the age 60 requirement imposed by the Corporation in the case of Mr. Cosgrove comes within the exemption created by sec. 4 (6) of the Human Rights Code.

Furthermore, argued Mr. O'Neill, the collective agreement between





Local 284 and the Corporation, which binds Mr. Cosgrove, constitutes in any event a valid contracting out by the parties from the provisions of the Human Rights Code. I do not find it necessary to deal with this argument and the thorny problems of public policy which it raises.

#### DECISION

In contract to the volume of testimony, number of exhibits and length of arguments entertained or submitted at the hearing, as evidenced by the body of this report, it is felt that the ultimate legal issue involved, although unique and difficult, can be resolved in comparatively brief fashion.

The issue, simply stated, is whether a mandatory retirement age of sixty, regardless of a particular individual's ability, capacity or competency, is a bona fide occupational qualification and requirement for the position or employment of a fireman within the meaning of sec. 4 (6) of the Human Rights Code.

"Bona fide" is the key word. Reputable dictionaries whether general (such as Oxford and Webster) or legal (such as Black) regularly define the expression in one or several of the following terms, viz., honestly, in good faith, sincere, without fraud or deceit, unfeigned, without simulation or pretense, genuine. These terms connote motive and a subjective standard. Thus a person may honestly believe that something is proper or right even though, objectively, his belief may be quite unfounded and unreasonable. Applying this solely subjective standard I have no doubt whatsoever that the Corporation in enacting by-law 2085 and negotiating the collective agreement upon which it is founded were acting honestly, as opposed to maliciously, deceitfully or for



some oblique or ulterior purpose in disguise.

However, that cannot be the end of the matter or the sole meaning to be attributed to "Bona fide" for otherwise standards would be too ephemeral and would vary with each employer's own opinion (including prejudices), so long as it is honestly held, of the requirements of a job, no matter how unreasonable or unsupportable that opinion might be. Thus an airline may sincerely feel that its stewardesses should not be over 25 years of age. However if it requires such a limitation as a condition of employment or continuing employment I would have no doubt that such limitation would not qualify as a bona fide occupational qualification or requirement under the exemption created by sec. 4 (6). Why? Because, in my opinion, such a limitation lacks any objective basis in reality or fact. In other words, although it is essential that a limitation be enacted or imposed honestly or with sincere intentions it must in addition be supported in fact and reason "based on the practical reality of the work a day world and of life" (adopting the words of Mr. O'Neill in his summation).

In my view the age 60 mandatory retirement provision imposed by by-law 2085 satisfies both aspects of the word "Bona fide". It is a condition honestly imposed and, on the basis of the evidence of the Corporation's witnesses, which I accept, it is a condition which reasonably and properly can be imposed in the special context of firefighters. Firefighters (along with policemen) belong to one of the most hazardous occupations in Ontario and the legislature has recognized their unique status whereby OMERS excepts them, and these occupations alone, from its normal age 65 pension-retirement plan



and permits firefighters and police officers to retire normally at age 60. It is not unreasonable, in all the circumstances, that such a retirement be made mandatory, and hence with bona fides, as I find to be the case established at this hearing.

In conclusion I should add, in deference to the argument of Mr. Polika, that I am not saying that mandatory retirement at age 60 is the only alternative, or even the best alternative, available to the municipality and the local association but such a requirement I find to be reasonable, supported by the evidence, honestly motivated and hence bona fide within the exemption provided by sec. 4 (6) of the Code.

It follows from what I have said that a breach of the Ontario Human Rights Code by the Corporation of the City of North Bay has not, in my opinion, been established.

All of which is respectfully submitted.

DATED at London, Ontario, this 21st day of May 1976.

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R. S. Mackay, Q.C.

